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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Amendment of Section 73.202(b)) MM Docket No. 98-217
Table of Allotments,) RM-9382
FM Broadcast Stations.)
)
(Gassaway, West Virginia)

To: Mass Media Bureau (Policy & Rules)

REPLY COMMENTS

Mountain State Broadcasting ("Mountain State"), by its attorney, respectfully submits these reply comments to the comments of Jim Milliken in the above-captioned proceeding.

Milliken is the owner of WSGB(AM) and WCKA(FM), licensed to Sutton, West Virginia, which is about five miles from Gassaway. Both communities are in Braxton County and Milliken's stations are the only stations in the county.

Milliken opposes the proposed allotment, arguing that his stations adequately serve Gassaway's needs. He even states that his stations provide at least equal service to Gassaway and Sutton.¹ Milliken asserts that the Commission has held that "a community having full access to the radio stations licensed to its nearby neighbor should not be considered a community needing its own outlet under Section 307(b)."

To support his allegation, Milliken cites a number of cases

¹ The Commission requires stations to devote the largest part of their service to their city of license. If Milliken's stations are ignoring Sutton in favor of Gassaway, as Milliken states, the Commission should question whether the stations merit license renewal when their current licenses expire.

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on page 6 of his comments. These cases are not on point, however. Penacock, New Hampshire, was found to be a part of the incorporated community of Concord; thus it was not a separate community capable of receiving an allotment of its own. Vimville and Oak Beach were found to lack sufficient indicia of a community based on the specific facts provided. There was no consideration of service from existing stations. Milliken's attempt to cite authority for his position fails utterly.

Milliken's stations' service to Gassaway does not demonstrate that Gassaway has no need for its own station. To the contrary, it shows that Gassaway has needs and interests of its own. Service to Gassaway by other stations does not replace the community's need for its own local outlet. Such service is not mandated by any Commission rule or policy; Milliken's stations are required only to serve Sutton, their community of license. Service to any other community is optional. Milliken may change the stations' focus at any time, reducing or discontinuing their concern with Gassaway's needs.

In this regard, it is instructive to recall the argument Milliken's counsel raised against the use of integration as a method of evaluating competing applicants which carried great weight in Bechtel v. FCC, 10 F. 3d 875 (D.C. Cir. 1993). There he successfully argued that ownership is merely "ephemeral", and thus cannot be the basis of FCC decisions which have permanent effect.

This argument applies equally to Milliken's ownership of his

stations and their past service to Sutton. Even though Milliken may have owned his Sutton stations for 19 years, there is no guarantee he will continue to own them in the future; he may sell them at any time, and the new owner may take a different view of the area's needs. Milliken's Comments refer to no case where the Commission has refused to allot a station to an independent and otherwise worthy community simply because an existing station provides some measure of service thereto.

Milliken's motivation in opposing Mountain State's proposal is simply to preserve his monopoly in broadcasting in the area. The Commission is not charged with protecting existing stations from competition²; many years ago it determined to ignore economic arguments against new broadcast services. Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 FCC Rcd 638 (1988). recon. denied, 4 FCC Rcd 2276 (1989). In any event, Milliken has not even attempted to provide any facts to support its assertion that a allotting a station to Gassaway would disserve the public interest by adversely affecting Milliken's ability to provide public interest programming.

Here, the Commission is not presented with competing proposals for a new station, but merely the question of whether to allot the new channel at Gassaway. Milliken's desire to protect

² More than once the Commission has found that the public interest is served by allotting a first competitive service to a community, even in lieu of a first service to a smaller city. See, e.g. Ruarch Associates, 99 FCC 2d 338 (Rev. Bd. 1984), aff'd, 101 FCC 2d 1358 (1985) and Beacon Broadcasting, 104 FCC 2d 808 (Rev. Bd. 1986) (Subsequent history omitted.)

its monopoly can carry no weight in this matter. c.f. Revision of FM Assignment Policies and Procedures, 80 FCC 2d 88 (1982). (Allotment of a new service is preferable to an upgrade of an existing service.)

Milliken does not dispute the community status of Gassaway, and further acknowledges the Commission's long standing policy of allotting FM channels to communities. He cites the 1982 report and Order which:

expressed a policy under which, since Gassaway is an incorporated place listed in the United States Census, that conclusively establishes its entitlement to an FM allotment under Section 307(b), irrespective of, and to the exclusion of, any other facts and circumstances. Milliken Comments, page 7, Paragraph (d).

To remove any doubt of Gassaway's status, attached hereto is a page from the 1990 Census of Population and Housing, as issued by the U.S. Department of Commerce, which identifies Gassaway as a town within Braxton County.

Milliken disputes the location of certain businesses identified by Mountain State as being located in Gassaway. While such information is not relevant to the Commission's determination that Channel 253A should be allotted to this community, Mountain State wishes to address this matter. Attached hereto are pages from the internet site maintained by the Braxton County Local Visitors' and Convention Bureau, Ltd. These pages identify the businesses as located in Gassaway, and constitute the basis for Mountain State's assertions. In contrast, Milliken provides no proof, only unsupported claims in his comments which were signed by his counsel. His counsel does not assert personal knowledge

of the facts expressed in the Comments.

Milliken suggests something sinister in the fact that the undersigned counsel represents both Mountain State Broadcasting and Mountaineer Communications, which is a petitioner for a new FM service at Arnoldsburg, West Virginia. Counsel's involvement demonstrates the bona fides of the proposals, that there is an entity eager to provide the radio service sought. Commission policy requires no more and Milliken's assertion that the Commission should require disclosure of petitioner's principal or principals at this stage is not only unsupported but clearly incorrect.

As a general matter, the motivations of the parties are not relevant in an allotment proceeding. We decline to engage in the sort of nebulous inquiry into licensees' motivations that would be necessary were we to consider such matters, especially since the critical issues with respect to the public interest are primarily technical and demographic. Eatonton and Sandy Springs, Georgia, et al., 6 FCC Rcd 6581 (MMB 1991) (Subsequent history omitted.)

In this regard it is worth noting that the oppositions to both the instant proposal as well as to the Arnoldsburg channel, both of which were filed by local broadcasters seeking to keep their monopoly, used the same counsel and adopted much the same arguments. This strongly suggests that the two broadcasters banded and conspired together for the purpose of delaying the introduction of broadcast competition. Submission of pleadings for the purpose of delay is an unacceptable abuse of the Commission's processes, and has led to license revocation in the past. Radio Carrollton, 72 FCC 2d 264 (1979).

Accordingly, Mountain State's proposal fully complies with

all Commission requirements. The Commission should amend Section 73.202(b) to allot Channel 253A to Gassaway, West Virginia.

Respectfully Submitted,

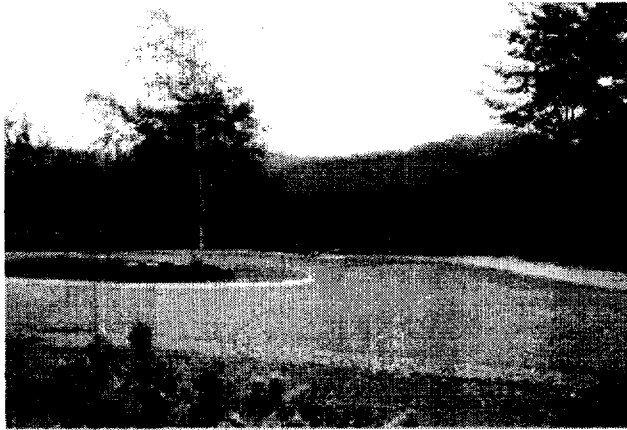
MOUNTAIN STATE BROADCASTING

By 
Jerrold Miller
Its Attorney

February 9, 1999

Miller & Miller, P.C.
P.O. Box 33003
Washington, DC 20033

Braxton County Memorial Hospital



**100 Hoylman Drive
Gassaway, WV 26624**

**(304) 364-5156
(304) 364-4129 fax**

Charter Member

Directions
YAHOO! MAPS 

Mission

"Braxton County Memorial Hospital will function as a non-profit health care delivery system, striving to improve health status through the provision and integration of services the community can support. Participate in regional health care network so which will offer a full range of coordinated services."

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Flatwoods Days Inn
Flatwoods Factory Stores
Braxton County
Economic Development



THE GEOGRAPHICAL CENTER OF WEST VIRGINIA

Welcome to Braxton County, the geographical center of West Virginia. Please choose a category on the left to take a tour of Braxton County. Our county has so much to offer that is hard to put it all on the site so please look around. If you have any questions or comments, please email us. Our email address is info@braxtonwv.org or [Click Here](#) to use our automated email form.

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Saturday, January 23, 1999

Email Us with any comments or suggestions.
Site Designed and Maintained by: Steven Bright

Local Dining

**Flatwoods Foodcourt at Flatwoods
Factory Outlet Stores**
245 Skidmore Lane
Sutton, WV 26601
1-304-765-3860

The Cafe
203 Main Street
Sutton, WV 26601
1-304-765-2110

Down to the Wire
501 River Street
Gassaway, WV 26624
1-304-364-8967

Garden Cafe
532 Elk Street
Gassaway, WV 26624
1-304-364-2600

Hotel Midway
200 Main Street
Sutton, WV 26601
1304--765-5242

Lloyd's Restaurant
PO Box 224
Flatwoods, WV 26601
1-304-765-2626

Mexican Blues Cafe
517 Elk Street
Gassaway, WV 26624
1-304-364-8276

Pizza Hut
Interstate 79 Exit 67
Gassaway, WV 26624
1-304-364-2255

Shelly's Restaurant
100 2nd Street
Sutton, WV 26601
1-304-765-7330

Silver Spoon Restaurant

Century Inn
15 Camben Av.
Sutton, WV 26601
1-304-765-7411

Elk River Inn
308 Elk Street
Gassaway, WV 26624
1-304-364-2688

Granny's Kitchen
PO Box 312
Frametown, WV 26623
1-304-364-5149

Kentucky Fried Chicken
1994 Sutton Lane
Sutton, WV 26601
1-304-765-3100

→ **Long John Silvers**
Mid City Plaza
Gassaway, WV 26624
1-304-364-5910

McDonalds of Flatwoods
1990 Sutton Lane
Sutton, WV 26601
1-304-765-2665

Oasis Diner
24 Little Birch Rd
Sutton, WV 26601
1-304-765-2635

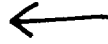
Rumors Are Us Inc
522 Elk Street
Gassaway, WV 26624
1-304-364-4349

Shoney's
25 Woodward Drive
Flatwoods, WV 26621
1-304-765-5357

Subway of Flatwoods

Pharmacies

Revco Drug Store
Gassaway, WV 26624
1-304-364-5161



Rite Aid Pharmacy
168 Main Street
Sutton, WV 26601
1-304-765-2562

Walker Carl Drug Store
620 Elk Street
Gassaway, WV 26624
1-304-364-5193



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Gassaway (WV) Volunteer Fire Department



[N/A](#)

n1a01168@mail.wvnet.edu

[Fire and EMS Information Network](#)

[submit an application](#)

In Case of Emergency: Dial 911

About the Gassaway (WV) Volunteer Fire Department

About the Gassaway (WV) Volunteer Fire
Department

Gassaway (WV) Volunteer Fire Department proudly protects 3000 people living in an area of 100 square miles. We operate out of two stations that protect a primarily residential area. Our department is a public department whose members are on a volunteer status. We have an ISO rating of 6.

The department was founded in 1905. The original apparatus was a hand-pulled hose cart

The GVFD serves Gassaway (Pop. 1200) and surrounding rural area. The whole area is

mountainous. The dept. has about 30 members.

Table 2. Age: 1990—Con.

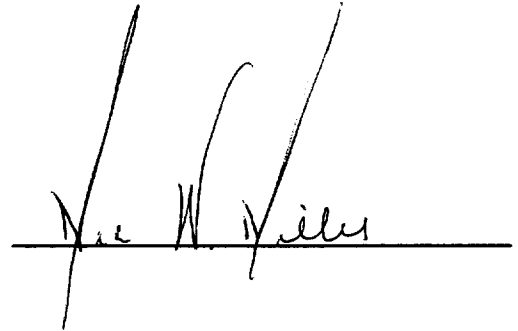
[For definitions of terms and meanings of symbols, see text]

State County Place and [In Selected States] County Subdivision	All persons	Age												Median age
		Under 5 years	16 years and over	18 years and over	18 to 20 years	21 to 24 years	25 to 44 years	45 to 54 years	55 to 59 years	60 to 64 years	65 years and over	75 years and over	85 years and over	
PLACE AND COUNTY SUBDIVISION— Con.														
East Bank town, Kanawha County	892	38	710	690	43	47	265	93	38	46	158	59	17	37.8
Beacon town, Putnam County	1 256	74	980	946	47	55	371	157	52	67	197	84	13	36.6
Elizabeth town, Wirt County	900	81	690	673	38	38	263	94	40	38	162	81	19	34.8
Elk Garden town, Mineral County	261	16	204	198	14	15	71	32	10	16	40	22	2	36.3
Elkins city, Randolph County	7 420	363	6 097	5 900	550	434	1 982	734	272	362	1 566	784	207	37.7
Elkview CDP, Kanawha County	1 047	63	835	806	44	45	300	155	65	49	148	52	11	39.3
Ellenboro town, Ritchie County	453	20	342	329	14	20	134	28	17	17	99	55	14	35.8
Enterprise CDP, Harrison County	1 058	56	843	802	52	49	262	128	65	63	183	77	24	38.9
Fairlea CDP, Greenbrier County	1 743	110	1 434	1 396	78	108	517	161	87	89	356	195	83	36.5
Fairmont city, Marion County	20 210	967	16 805	16 363	1 452	1 380	5 050	1 853	919	1 181	4 528	2 038	531	38.6
Fairview town, Marion County	513	17	431	412	15	25	137	55	34	35	111	47	13	42.7
Falling Spring town, Greenbrier County	191	11	157	149	10	10	43	22	9	17	38	18	4	41.0
Farmington town, Marion County	414	24	331	314	18	15	97	38	22	22	102	50	10	40.7
Fayetteville town, Fayette County	2 182	96	1 757	1 680	77	98	624	214	93	120	454	243	66	38.5
Flatwoods town, Braxton County	324	31	262	253	18	24	86	37	12	8	68	41	9	36.7
Flemington town, Taylor County	352	11	288	273	18	27	82	50	21	18	57	33	7	39.2
Follansbee city, Brooke County	3 339	165	2 673	2 575	113	133	984	312	186	230	617	235	39	38.5
Fort Ashby CDP, Mineral County	1 288	96	989	947	41	62	403	143	51	78	169	59	10	35.4
Fort Gay town, Wayne County	852	62	648	616	43	46	220	82	31	44	150	77	19	33.4
Franklin town, Pendleton County	914	69	742	729	22	44	237	66	43	51	266	157	58	41.8
Friendly town, Tyler County	146	5	120	114	7	6	33	25	8	11	24	12	1	40.0
Gary city, McDowell County	1 355	60	1 117	1 081	54	37	272	124	92	110	392	171	44	48.7
Gassaway town, Braxton County	946	58	762	727	32	28	255	97	55	60	200	92	26	40.5
Glenview bridge town, Fayette County	691	35	533	508	31	41	184	56	27	42	127	49	9	36.3
Gilbert town, Mingo County	456	30	352	339	21	24	141	62	21	23	47	18	3	32.5
Gilbert Creek CDP, Mingo County	1 784	108	1 315	1 253	90	106	596	170	81	73	137	45	8	29.9
Glasgow town, Kanawha County	906	29	756	722	31	40	226	95	51	63	216	111	41	42.9
Glen Dale city, Marshall County	1 612	72	1 323	1 278	57	49	447	168	93	132	332	139	26	41.9
Glenville town, Gilmer County	1 923	78	1 669	1 649	445	246	369	116	66	70	337	212	71	24.9
Grafton city, Taylor County	5 524	364	4 370	4 209	207	272	1 402	495	254	333	1 246	615	206	38.6
Grantsville town, Calhoun County	671	56	506	489	18	28	171	61	23	34	154	78	18	36.8
Grant Town town, Marion County	694	36	549	517	24	32	168	63	36	43	151	64	15	40.6
Granville town, Monongalia County	798	40	663	643	33	66	232	84	43	58	127	60	9	38.1
Hamblenton town, Tucker County	265	11	214	204	12	11	79	23	18	15	46	22	5	37.9
Hamlin town, Lincoln County	1 030	58	816	787	51	47	276	107	65	56	185	90	25	37.6
Handley town, Kanawha County	334	18	263	253	12	25	81	26	20	30	59	25	7	37.2
Harman town, Randolph County	128	3	104	102	8	8	42	8	3	9	24	13	4	33.6
Harpers Ferry town, Jefferson County	308	25	261	255	11	11	90	44	15	18	66	32	12	43.2
Harrisville town, Ritchie County	1 839	100	1 491	1 446	81	90	541	184	75	90	385	206	61	37.7
Hartford City town, Mason County	487	30	378	363	30	19	155	59	31	15	54	19	5	33.0
Harts CDP, Lincoln County	2 332	138	1 736	1 641	134	148	695	258	91	97	218	78	10	31.2
Hedgesville town, Berkeley County	227	23	179	170	12	17	64	30	12	8	27	13	3	33.6
Henderson town, Mason County	549	39	409	393	23	27	162	49	33	23	76	35	4	33.6
Hendricks town, Tucker County	303	15	235	222	14	10	88	37	11	18	44	23	5	36.9
Hillsboro town, Pocahontas County	188	11	151	146	7	13	46	19	6	5	50	24	5	39.5
Hinton city, Summers County	3 433	182	2 773	2 679	131	138	786	316	195	229	884	426	108	42.8
Holden CDP, Logan County	1 246	56	969	924	55	47	367	107	71	66	211	92	12	37.0
Hooverson Heights CDP, Brooke County	3 056	165	2 406	2 314	149	165	891	333	149	151	476	217	70	36.1
Hundred town, Wetzel County	386	25	304	297	14	11	97	36	17	23	99	60	16	41.4
Huntington city	54 844	2 703	45 491	44 235	4 414	3 934	14 119	5 137	2 582	3 144	10 905	4 952	1 257	36.7
Cabell County	50 505	2 504	41 941	40 802	4 235	3 764	12 942	4 636	2 338	2 858	10 029	4 626	1 190	36.3
Wayne County	4 339	199	3 550	3 433	179	170	1 177	501	244	286	876	326	67	40.4
Hurricane city, Putnam County	4 461	309	3 399	3 274	150	241	1 417	499	201	206	560	206	37	34.2
Huttonsville town, Randolph County	211	18	156	149	5	10	72	19	4	10	29	10	1	34.0
Jaeger town, McDowell County	551	33	446	425	25	18	147	67	22	35	111	45	9	39.6
Inwood CDP, Berkeley County	1 360	83	1 096	1 060	56	70	451	166	75	71	171	47	8	36.5
Jane Lew town, Lewis County	439	24	362	351	21	24	130	35	24	20	97	40	7	37.6
Junior town, Barbour County	542	46	390	370	25	41	139	55	14	21	75	43	9	29.2
Kenova city, Wayne County	3 748	206	3 057	2 965	155	216	989	441	228	245	691	281	59	38.8
Kermit town, Mingo County	342	18	256	248	18	22	103	31	12	20	42	16	5	32.0
Keyser city, Mineral County	5 870	299	4 787	4 633	601	292	1 409	620	259	295	1 157	508	90	36.4
Keystone city, McDowell County	627	48	466	447	24	29	136	47	21	29	161	74	11	36.9
Kimball town, McDowell County	550	38	410	393	17	17	131	39	24	29	136	59	14	37.8

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February , 1999, a copy of the foregoing document was placed in the United States mail, first class postage prepaid, addressed to the following:

Gene A. Bechtel, Esq.
Bechtel & Cole, Chartered
1901 L Street, NW, Suite 250
Washington, DC 20036

A handwritten signature, appearing to read "Gene A. Bechtel", is written over a horizontal line. The signature is in cursive and includes a large, stylized initial "G".